2007

State of Utah v. Todd Mulder : Brief of Appellant

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
Plaintiff / Appellee	:	
vs.	:	Case No. 20070511-CA
TODD MULDER,	:	
Defendant / Appellant	:	

REPLY BRIEF OF APPELLANT

APPEAL FROM THE FIFTH DISTRICT, WASHINGTON COUNTY
STATE OF UTAH, FROM A CONVICTION OF AGGRAVATED KIDNAPPING
BEFORE THE HONORABLE G RAND BEACHAM

MARK SHURTLEFF
Utah Attorney General
APPEALS DIVISION
160 East 300 South, Sixth Floor
P.O. Box 140854
Salt Lake City, Utah 84114

Counsel for Appellee

MARGARET P. LINDSAY (6766)
775 West Center Street
P.O. Box 1059
Spanish Fork, Utah 84660
Telephone: (801) 318-3194

Counsel for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutory Provisions

Cases Cited

IN THE UTAH COURT OF APPEALS

STATE OF UTAH, Plaintiff/Appellee, vs. TODD MULDER, Defendant/Appellant.	:	Case No. 20070511-CA

REPLY BRIEF OF APPELLANT

*****

ARGUMENT

POINT I

TRIAL COUNSEL WAS INEFFECTIVE IN FAILING TO ARGUE THAT MULDER'S CONVICTION FOR AGGRAVATED KIDNAPPING SHOULD MERGE INTO HIS CONVICTION FOR AGGRAVATED ROBBERY

To prevail on a claim of ineffective assistance of counsel, Mulder must show that "counsel's performance was deficient, in that it fell below an objective standard of reasonable professional judgment," and that "counsel's deficient performance was prejudicial – i.e., that it affected the outcome of the case." *State v. Litherland*, 2000 UT 76, ¶ 19, 12 P.3d 92 (quoting *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984)). Here, trial counsel's performance was both deficient and prejudicial.

Presently, counsel was deficient in their failure to argue that the aggravated kidnapping charge should be merged into the aggravated robbery charge. The merger

doctrine, as outlined in *Finlayson,* recognizes that merger of two or more separate crimes may occur when a defendant is convicted of both a kidnapping and a crime in which a detention is inherent, such as sexual assault or robbery. *See*, *State v. Finlayson.* 2000 UT 10, ¶ 23, 994 P.2d 1243. The Court explained, "[b]y definition, every rape and forcible sodomy is committed against the will of the victim and therefore involves a necessary detention, which is of course, required by the kidnapping statutes. Thus, absent a clear distinction, virtually every rape and robbery would automatically be kidnapping as well. *Id.* at ¶ 19. *See also*, *State v. Mecham*, 2000 UT App 247, ¶ 29; 9 P.3d 777 (recognizing that detention, "*while not an element, is inherent in most aggravated felonies.*').

To prevent double punishment for essentially the same offense, *Finlayson* outlines a three-prong test to aid in determining whether or not there is a sufficiently clear distinction between the robbery and the kidnapping so as to support separate convictions.

> [I]f a taking or confinement is alleged to have been done to facilitate the commission of another crime, to be kidnapping the resulting movement or confinement:
>
> (a) Must not be slight, inconsequential and merely incidental to the other crime;
>
> (b) Must not be of the kind inherent in the nature of the other crime; and
>
> (c) Must have some significance independent of the other crime in that it makes the other crime substantially easier of commission or substantially lessens the risk of detection.

Id. at ¶ 23 (quoting *Kansas v. Buggs*, 547 P.2d 720, 731 (Kan. 1976)).

Although this is not a novel issue and has been addressed by the Utah appellate

courts, the present facts are distinguishable. As such, Mulder asserts that under the three-prong analysis proffered in *Finlayson*, trial counsel was ineffective for not arguing that merger applied.

A. The detention of Allgood was "slight, inconsequential, and merely incidental" to the aggravated robbery.

The State asserts that the determining factor in whether or not the detention is slight, inconsequential or incidental depends on whether or not Allgood removed the handcuffs upon leaving (Appellee Br. at 25). The State argues that because Campbell did not remove the handcuffs after taking the property, such action constitutes a continued detention unnecessary to the commission of the aggravated robbery (Appellee Br. at 23). Although Allgood remained handcuffed after Campbell fled the scene, any perceived detention created by handcuffing Allgood was slight and inconsequential as distinguished from precedent.

For instance, in *State v. Lopez*, 2001 UT App 123, 24 P.3d 993, this Court addressed whether the defendant's kidnapping merged with the assault. In *Lopez*, the defendant, infatuated with his estranged spouse, dragged her from her apartment, and down stairs while holding her in a headlock. *Id.* at ¶¶ 6-7. After the defendant dragged her down the sidewalk and tried to force her into his truck, he repeatedly stabbed her in the arm, head, and neck. *Id.* at ¶ 7. This Court held that the defendant's movement of the victim "was neither inconsequential nor incidental to the assault" because it "spanned the length of the apartment building" and the defendant could have stabbed the victim "at any

point after he grabbed the knife without confining or moving her." *Lopez*, 2001 UT App 123 at ¶ 13.

Also, in *State v. Mecham*, 2000 UT App 247, this Court addressed whether the defendant's binding of and confinement of victims constituted a separate offense from the robbery. In *Mecham*, the defendants escorted three movie-theatre employees, at gunpoint, from the downstairs portion of the building to the upstairs manager's office. *State v. Mecham*, 2000 UT App 247 at ¶¶ 3-5. After taking money from the manager's safe and forcing two more employees into the office with the other employees, the defendants left the building, "leaving all of the theatre employee's bound." *Id.* at ¶ 7. This Court held that based on the trial court's observation, all the employees were bound and "it was unclear how long they would remain so before they were discovered or able to free themselves." *Id.* at ¶ 33. Concluding that this was not a "typical robbery." *Id.* Therefore, the length of the restraint or detention is considered to determine whether it is slight, inconsequential, or merely incidental to the underlying offense.

Furthermore, the Utah Supreme Court has found that a detention that furthers the purpose of the crime is "slight, inconsequential, and merely incidental to the other crimes." *Finlayson*, 2000 UT 10 at ¶ 23. In *Finlayson*, the defendant lured his victim into his apartment under the guise of studying Japanese. *Id.* at ¶¶ 2-3. After his amorous advances to the victim were rejected, "the defendant then pulled her from the chair in which she was sitting, carried her into his bedroom with his arms around her body, and

sexually assaulted her." *Finlayson*, 2000 UT 10 at ¶ 4.

Relying on the principle of avoiding multiple convictions for "essentially the same conduct[,]" *Finlayson*, 2000 UT 10 at ¶ 17, the Utah Supreme Court concluded that kidnappings and robberies involve a "necessary detention . . . [and] absent a clear distinction, virtually every rape and robbery would automatically be a kidnapping as well." *Id.* at ¶ 19. As such, the Court found that defendant's carrying his victim into his bedroom and handcuffing her "while the sex crimes were in progress constituted a detention that was slight, inconsequential, and merely incidental to the other crimes." *Id.* at ¶ 23. In the instant case, Campbell's actions were dissimilar to those in *Lopez* and *Mecham*, and yet more similar to those in *Finlayson*.

Here, Campbell's handcuffing Allgood was slight and inconsequential to the aggravated robbery. First, unlike in *Lopez*, there was no asportation of Allgood; Campbell merely handcuffed Allgood so that he could "go through with the plan" without Allgood interfering. (R. 254: 369; 253: 220). And although movement of this type is not necessary to commit kidnapping, it is a threshold fact that distinguishes just a robbery from a robbery combined with a kidnapping. *See*, *Finlayson*, 2000 UT 10 at ¶ 23. In *Finlayson*, the Court found that the physical restraint of the victim , in order to sexually assault her, was incidental. *Id.*

Moreover, unlike *Mecham*, *Lopez*, and *Finlayson*, Campbell did not move Allgood in order to commit the robbery, he only handcuffed Allgood to mitigate any interference

during the robbery. In *Lopez*, the defendant could have assaulted the victim at anytime before dragging her out of the building. *Lopez*, 2001 UT App 123 at ¶ 13. Here, however, Campbell's handcuffing was slight an incidental to the robbery because it was in furtherance of the robbery and not some other crime.

Furthermore, restraining Allgood was slight because Allgood was already incapacitated by the gunshot wound. Being handcuffed only slightly impeded Allgood's movement because it only partially restricted the movement of his arms, not his ability to move around freely as demonstrated by the fact that Allgood managed to call 911 (R. 252: 31).

B. The detention of Allgood is of the type inherent in a robbery.

The State asserts that the handcuffing of Allgood is similar to the detention in *Mecham* in which the court refused to merge a kidnapping charge with the robbery charge of a movie theater. The State mischaracterizes the court's holding *Mecham*. In *Mecham*, this Court did hold that the binding and confining of the victims that occurred was not inherent in an aggravated robbery; rather it was "an additional act, completely independent of the act of taking property by force of threat of force." *Mecham*, 2000 UT App 247 at ¶ 33. However, the court also stated that, "[t]he aggravated robbery in this case, and almost every aggravated robbery as a factual matter contain[ed] the elements needed to prove aggravated kidnapping." *Id.* at ¶ 31. The court goes on to say; "The prosecutor must [have shown] that the detention was beyond the 'minimum inherent in

[aggravated robbery].'" *Id.* at ¶ 30 (quoting *State v. Couch*, 635 P.2d 89, 93 (Utah 1981)).

In *Mecham* the detention was beyond the "minimum inherent in aggravated robbery." *Mecham*, 2000 UT App at ¶ 30. The defendants detained not only those necessary to complete the robbery, but additional employees as well. *Id.* at ¶ 33. In fact, the defendants had completed the robbery when they encountered two ushers in the building and forced them back into the office and detained them also. *Id.* Also, the binding of the employees occurred *after* the cash was taken. *Id.* at ¶¶ 6-7. In addition, the defendants in *Mecham* told the victims that they were to stay there for a set amount of time, essentially threatening them and detaining them beyond the completion of the robbery. *Id.* The present facts, however, differ.

Here, Allgood's detainment occurred *before* the robbery was completed and for the purpose of completing the robbery. Furthermore, Campbell did not detain anyone after completing the robbery nor did he further detain Allgood by threatening him or ordering him to stay for a certain period of time beyond his departure as in *Mecham*. The detainment began and effectively ended simultaneously with the commission of the robbery.

Furthermore, Allgood's detention is of the type inherent in a robbery. Elemental to robbery is the requirement that it be committed "by means of force or fear." Utah Code Ann. § 76-6-301(1) (2004). It is this force or fear which typically causes the detention. Thus, regardless of whether the detention arises from a threat of violence or

from physical force – e.g.., handcuffs – a detention is unavoidable and therefore inherent in the commission of a robbery.

C. The detention did not have some significance independent of the other crime. It did not make the other crime substantially easier to commit or substantially lessen the risk of detection.

The State asserts that the act of handcuffing Allgood made the robbery substantially easier to commit (Appellee Br. at 24-25). The State narrowly defines the typical robbery as one in which the "victim's detention consists of them simply standing still for a few brief moments." *State v. Mecham*, 2000 UT App 247, ¶ 33. However, even in the "typical robbery[,]" the robbery is made substantially easier to commit by the detention of the victims in forcing them to "simply [stand] still for a few brief moments." *Id.*

If this Court were to apply the State's rationale, the doctrine of merger would never apply because it would make "virtually every rape and robbery into a kidnapping as well." *Finlayson*, 2000 UT 10 at ¶ 23. If the determination of merger was to be based on a simple finding that the act made the robbery easier to commit, the doctrine of merger would have no real purpose - every act of detainment serves in some way to make the robbery easier to commit.

Furthermore, the detention was not done to avoid detection; rather it was done to accomplish the crime. As stated, Campbell handcuffed Allgood for the purpose of completing the crime. (R. 254: 369; 253: 220). Unlike in *Mecham* and *Finlayson*,

Campbell did not order or threaten Allgood to remain in a room for a certain period of time to facilitate his escape; rather, he left Allgood in the main section of the store. This is evidence further by the fact that Allgood was not restrained to the point where he could not call 911 or possibly leave the store. Therefore, it is more than reasonable to infer that the handcuffs would not have impeded Allgood from leaving the store either.

Moreover, handcuffing Allgood did not make the crime substantially easier to commit or lessen the risk of detection. *Finlayson*, 2000 UT 10 at ¶ 23. Although unfortunate, the fact that Campbell had mortally wounded Allgood by shooting him with a .32 caliber revolver, the act of handcuffing Allgood was superfluous (R. 253: 183, 185, 196). Already wounded, Allgood was no more incapacitated by being handcuffed than he already was from being shot. Because Allgood was severely wounded, handcuffing Allgood certainly did not make the crime substantially easier to commit or aid Campbell fleeing without detection.

This is a case where there is no "clear distinction" between the facts surrounding the conviction for aggravated robbery, and those support a conviction for aggravated kidnapping. The detention did not have any significance independent of the aggravated robbery. It did not make the robbery any easier to commit than the ordinary detainment involved in any robbery would, nor did it substantially lessen the risk of detection more than would be present in any robbery.

I. TRIAL COUNSEL'S PERFORMANCE WAS BOTH DEFICIENT AND PREJUDICIAL.

The failure of trial counsel to move for the merger of the aggravated robbery and aggravated kidnapping charges constitutes deficient performance – it falls below an objective standard for reasonable conduct. In *Finlayson*, the Utah Supreme Court reviewed a similar merger issue for ineffective counsel. The Court concluded that the facts did not support a conviction for aggravated kidnapping and forcible rape/sodomy. The court's statement of the ineffectiveness of counsel is applicable to this case:

> Yet defendant's counsel made no objection to this charge [aggravated kidnapping], and failed to raise this at any time, either during trial or following the conviction in a motion to vacate. As this is an issue that would have been raised outside the presence of the jury, no possible prejudice would have inured to defendant. When no possible explanation or tactical reason exists for such a decision, we have held that the first part of the *Strickland* test . . . is satisfied.

Finlayson, 2000 UT 10 at ¶ 24 (citations omitted). Here, because "no possible explanation or tactical reason" existed which would justify trial counsel's decision not to address the merger issue, the first part of the *Strickland* test, as in *Finlayson*, is satisfied.

Furthermore, the Court held in *Finlayson* that

> it is clear that the second part of the Strickland test has also been met. Objecting to the aggravated kidnapping charge in the trial court or moving to vacate the conviction would have precluded the court from properly allowed it. With this conviction, defendant has been prejudiced by the imposition of a ten-year-to-life sentence, which although concurrent, would likely increase the time the Board of Pardons and Parole would require him to serve.

Id. at ¶ 25. Here, failure to argue the merger issue resulted in the Appellant being prejudiced by a compounded sentence of fifteen years to life for Aggravated Kidnapping (R. 222-23; 239-242).

Here, the facts do not support a conviction for both aggravated kidnapping and aggravated robbery. Like in *Finlayson*, trial counsel was deficient in failing to raise this issue. Similarly, Mulder, like the defendant in *Finlayson*, was prejudiced by trial counsel's failure to raise this issue. In fact, prejudice to Mulder is greater than that to the defendant in *Finlayson* since Appellant was given a fifteen-year-to-life sentence that is to be served consecutively, not concurrently, to his other convictions (R. 222-23; 239-242).

Accordingly, Mulder requests that this Court conclude that he was denied his constitutional right to competent counsel and that his conviction for aggravated kidnapping should be vacated because it merges into the conviction for aggravated robbery.

II. THE EVIDENCE WAS INSUFFICIENT TO SUPPORT A CONVICTION FOR AGGRAVATED KIDNAPPING AND TRIAL COUNSEL WAS INEFFECTIVE IN FAILING TO MOVE FOR A DISMISSAL OF THAT CHARGE.

A motion to dismiss the aggravated kidnapping charge would not be futile and trial counsel's failure to make such a motion amounts to a deficient performance, "in that it fell below an objective standard of reasonable professional judgment," and that "counsel's deficient performance was prejudicial – i.e., that it affected the outcome of the

case." *State v. Litherland*, 2000 UT 76, ¶ 19, 12 P.3d 92 (quoting *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984)).

To establish Appellant's liability as an accomplice for aggravated kidnapping, the State had the burden of proving that he "knowingly or intentionally solicited, requested, commanded, encouraged, or intentionally aided" Campbell to commit aggravated kidnapping. Utah Code Ann. § 76-2-202 (1973).

The State cites to evidence that was presented in proving Appellant's role in the aggravated robbery. Appellant does not contest the proof offered as to the aggravated robbery charge. However, proof of the aggravated robbery does not constitute proof of the aggravated kidnapping charge. If that were the case, statutory merger would apply, which as the State points out and the Appellant agrees does not apply (Appellee Br. at 20, n. 1). Also, participation in the planning of the aggravated robbery does not constitute proof of the added element of aggravated kidnapping. In fact, Campbell himself testified that the plan to use the handcuffs to detain Allgood was his, and his alone. When asked specifically if this was his "plan alone or was that discussed," he replied, "That concept was pretty much mine alone" (R. 253:201-02).

The State also contends that inferences can be drawn that Appellant knew Campbell had handcuffs. It bases these inferences off evidence of another accomplice – Appellant's girlfriend, Lori Shlegel's, knowledge of the handcuffs. Schlegel's knowledge is not contested, nor is it synonymous with or proof of Appellant's knowledge. Evidence

of Schlegel's knowledge is not evidence of Appellant's knowledge of, encouragement to, or aiding in aggravated kidnapping. Furthermore, Campbell did not testify that Appellant gave him the handcuffs, or instructed him or encouraged him to use the handcuffs, and there was no evidence that Appellant solicited, requested, commanded, or encouraged Campbell to use the gun.

Even if those inferences can be drawn from the evidence presented, this does not amount to proof that Mulder "knowingly or intentionally solicited, requested, commanded, encouraged, or intentionally aided" in the commission of the aggravated kidnapping. A knowledge that Campbell was in possession of handcuffs or duct tape does not prove the required elements of aggravated kidnapping. The statutory definition of the crime requires that Appellant did more than knew about the possibility of a detention it requires Mulder to have "solicited, requested, commanded, encouraged, or intentionally aided" in committing aggravated kidnapping. Knowledge alone would not satisfy that burden.

The State goes on to assert that Campbell's testimony of his conversation with Appellant after the robbery amounts to proof of his involvement in the aggravated kidnapping. However, as previously stated, the detainment effectively ended when the robbery ended. Any knowledge that Appellant may have had acquired after the fact, was just that – knowledge after the fact and would not constitute proof that Appellant, "knowingly or intentionally solicited, requested, commanded, encouraged, or

intentionally aided" in the commission of the aggravated kidnapping.

Appellant concurs with the State in its assertion that counsel is not required to make futile motions; however, the motion to dismiss would not have been futile. The State did not present evidence sufficient to support a jury's finding beyond a reasonable doubt that defendant was an accomplice to aggravated kidnapping. And as state in *Finlayson*,

> Yet defendant's counsel made no objection to this charge [aggravated kidnapping], and failed to raise this at any time, either during trial or following the conviction in a motion to vacate. As this is an issue that would have been raised outside the presence of the jury, no possible prejudice would have inured to defendant. When no possible explanation or tactical reason exists for such a decision, we have held that the first part of the *Strickland* test . . . is satisfied.

Finlayson, 2000 UT 10 at ¶ 24 (citations omitted).

Therefore, trial counsel performed deficiently in failing to move for dismissal of the aggravated kidnapping charge. This deficient performance fell below an objective standard of reasonable professional judgment. Moreover, Mulder was prejudiced by counsel's deficient performance because he stands convicted of a crime without sufficient evidence and he was sentenced to fifteen-years-to-life on that conviction, a sentence that he was ordered to serve consecutively and not concurrently with his convictions. This sentence greatly lengthens the time he will serve when combined with the other two charges. This is particularly egregious considering that Campbell, the principal actor in all three crimes, is serving a single five-years-to-life sentence.

Accordingly, Mulder respectfully requests this Court to vacate his conviction for aggravated kidnapping because the evidence was insufficient to support a conviction and his trial counsel was ineffective in failing to move for its dismissal.

CONCLUSION AND PRECISE RELIEF SOUGHT

Mulder asks that this Court reverse his conviction for Aggravated Kidnapping on the grounds set forth in Appellant's briefs.

DATED this 20th day of August, 2009.

MARGARET P. LINDSAY
Counsel for Appellant

CERTIFICATE OF MAILING

I hereby certify that I delivered two (2) true and correct copies of the foregoing Brief of Appellant to the Appeals Division, Utah Attorney General, 160 East 300 South, Sixth Floor, P.O. Box 140854, Salt Lake City, UT 84114, this 19th day of August, 2009.

Margaret P. Lindsay
Counsel for Appellant